

## **N.D.A.G. Letter to O'Connell (Aug. 18, 1992)**

August 18, 1992

Mr. David O'Connell  
State Senator  
Route 1, Box 78  
Lansford, ND 58750

Dear Senator O'Connell:

Thank you for your July 9, 1992, letter requesting an informal opinion on whether the members on a board of directors of a nonprofit cooperative, who receive compensation for their services, are employees of the cooperative for purposes of workers' compensation.

The North Dakota Supreme court has explained that "[t]he Workmen's Compensation Act is to be construed liberally with the view of extending its benefit provisions to all who can be fairly brought within them." Syverson v. North Dakota Workmen's Compensation Bureau, 406 N.W.2d 688, 690 (N.D. 1987); see also Holmgren v. North Dakota Workers Compensation Bureau, 455 N.W.2d 200, 205 (N.D. 1990). The Act defines an "employee" as "every person engaged in a hazardous employment under any appointment, contract of hire, or apprenticeship, express or implied, oral or written . . . ." N.D.C.C. § 65-01-02(14). "Hazardous employment" is defined by the Act as "any employment in which one or more employees are employed regularly in the same business or in or about the establishment . . . ." N.D.C.C. § 65-01-02(21). N.D.C.C. § 65-01-03 further provides that "[e]ach person who performs services for another for a remuneration, whether the same is paid as a salary, commission, or other considerations in lieu thereof, under any agreement or contract of hire, express or implied, is presumed to be an employee of the person for whom the services are performed . . . ."

Directors who receive a fixed fee for services provided to the cooperative are receiving remuneration for services. Directors also are "employed" regularly by the cooperative, usually for a fixed term, thereby meeting the "hazardous employment" definition. Based upon the Workers Compensation Act's definition of "employee", it is my opinion that compensated members of a board of directors are employees for purposes of workers' compensation. This conclusion is consistent with the stated purpose of the Workers' Compensation Act -- to insure that compensation relied on by a worker and a worker's family is not lost as a result of injury or accident. See N.D.C.C. § 65-01-01.

In Kentucky Farm and Power Equipment Dealer's Association v. Fulkerson Brothers, Inc., 631 S.W.2d 633 (Ky. 1982), the court addressed whether an unpaid officer of a non-profit trade association was an "employee" under the Kentucky Workers' Compensation Act. The court concluded that the officer was not an employee because the officers and directors served without compensation. Id. at 635. Without compensation there were no wages which could be protected under the Act. Id.

Unlike the officers and directors in the Kentucky case, the directors mentioned in your letter receive compensation for their services, and therefore come within the scope and purpose of the North Dakota Act. See also IB Larson, Workmen's Compensation Law, § 47.41 (1992).

In your letter you state that N.D.C.C. § 10-15-30 supports the position that directors on a board are not employees of a cooperative because that section makes distinctions between a director, an officer, and an employee. Although N.D.C.C. ch. 10-15 makes distinctions between a director and an employee, whether an individual is an employee for purposes of workers' compensation is controlled by N.D.C.C. § 65-01-02(14). See N.D.C.C. § 1-02-07.

Based upon the above analysis, it is my opinion that members on a board of directors of a nonprofit cooperative that receive compensation for their services are employees of the cooperative under N.D.C.C. § 65-01-02(14).

I trust this responds to your inquiry.

Sincerely,

Nicholas J. Spaeth  
Attorney General

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